



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 11460/22

In the matter between:

VAN ZYL'S INCORPORATED

Plaintiff

and

ANDRE DANIEL BRAND N.O.

First Defendant

SUSARA MARGARETHS BRAND N.O.

Second Defendant

JAN DU RAAN N.O.

Third Defendant

WILLEM ALBERTUS BLIGNAUT

Fourth Defendant

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

30 November 2022
DATE


SIGNATURE

JUDGMENT

HF JACOBS, AJ:

[1] This is an exception to the plaintiff's particulars of claim taken by three of the four defendants. The first, second and third defendants complain that the particulars of claim is vague and embarrassing alternatively that it does not contain allegations necessary to sustain a cause of action. Although no prayer to that effect is contained in the notice of exception it seems that the three defendants would expect, should the exception be upheld, that the pleading be struck out. There was no challenge by the plaintiff to the formulation of the notice of exception and I will approach the matter on the basis that should the exception be upheld and the pleading be struck, that time be afforded to the plaintiff to amend it.

[2] When considering a challenge of a pleading at exception stage, the pleading must be considered as a whole.¹ During exception proceedings where the challenge to the pleading is made on both recognised grounds (that the pleading is vague and embarrassing and that it lacks averments necessary to sustain a cause of action), a two stage approach is followed, for the complaint that the pleading is vague and embarrassing calls for an enquiry to cover the situation where, if a cause of action appears from the pleading, there is some defect or incompleteness in the manner in which it has been formulated which results in embarrassment to the defendant. Our courts, in cases of that kind, uphold exceptions as *"To permit the action to proceed towards trial based on it by dismissing the exception and requiring the defendant to plead to it would only go to compound the embarrassment,*

¹ *Nel and Others N.O. v McArthur* 2003 (4) SA 142 (T) at 149F

and quite likely give rise to a confusing or argumentative plea. It would ultimately conduce to a situation where a case manager or trial judge would likely be faced with some difficulty in delimiting the issues for the purpose of judicially managing the conduct of the trial. It is not only the second defendant that would be prejudiced if the pleading were to stand, but also the court.”²

[3] An exception that the pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.³ If a pleading both fails to comply with the provisions of Rule 18 (applicable to pleadings in general) and is vague and embarrassing, the excipient has the choice of remedies: he may either bring an application in terms of Rule 30 to have the pleading set aside as an irregular step or may raise an exception in terms of Rule 23. The two remedies are, however, based on separate and distinct complaints requiring different adjudication but the crucial distinction between an exception and a complaint under Rule 30 is firstly that an exception that the pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded, and secondly, a Rule 30 objection may only be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity. In the latter situation it is not necessary for the

² *Super Group Trading (Pty) Ltd t/a Super Rent v Bauer and Another* 2022 (5) SA 622 (WCC) at [22]

³ See *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I

objector to show that the failure to plead material facts goes to the root of the cause of action.⁴

[4] The general principles applicable to exceptions are conveniently set out by Maier-Frawley J in *Matthews*⁵ as follows:

"Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars." (footnotes omitted)

⁴ See *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinustn* 1992 (4) SA 466 (W) at 469F-J; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902D-H; Erasmus, Superior Court Practice, Volume 2, D, RS18, 2022 D1-293 – D1 – 310E

⁵ *Merb (Pty) Ltd v Matthews* (unreported judgment), Gauteng High Court Johannesburg case number 2020/15069 dated 16 November 2021

Exceptions are also not to be dealt with in an over-technical manner, and as such, a court looks benevolently instead of over-critically at a pleading.

An excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.

Courts have been reluctant to decide exceptions in respect of fact bound issues.

Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.

An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (i) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient.”

[5] Pleadings in civil litigation do not only serve to inform an adversary of the case he or she has to meet. The importance of pleadings has been shown by W.J. Odgers many years ago and quoted with approval in *Triplejaw*⁶ as follows: “The system of pleading introduced by the Judicator Acts in theory the best and wisest, and indeed the only sensible system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies; He must deal specifically with the facts alleged by his opponent, admitting or denying each of them in detail; and thus the matters in dispute are speedily ascertained and defined.”

⁶ *Triplejaw Equipment (Rhodesia) (PVT.) Ltd v Lilienthal* 1961 R & N 501 (FCS)

[6] If pleadings are not formulated in conformity with the well established practice the trial will be conducted by counsel at cross purposes before a mystified judge and when the fog is lifted by a court of appeal the defendants would find themselves landed with the costs of an appeal and the plaintiff with the costs of the trial and both parties would go away feeling that litigation is an expensive and unsatisfactory business. All this can be avoided if the plaintiff's particulars of claim is formulated with the required measure of particularity.

[7] I will now turn the plaintiffs' particulars of claim. The particulars of claim is a 22 page document to which 12 annexures are attached. Some of the annexures comprise more than one document. The annexures make up 98 pages. The particulars of claim with its annexures, therefore, comprise 120 pages. Paragraphs 1 – 7 of the particulars of claim contain the citation of the parties, allegations in support of jurisdiction and in paragraph 8 the purpose of the action is stated. This is followed by paragraphs 9 and 10 under the rubric GERMANE HISTORY. The "GERMANE HISTORY" makes up 9 of the 22 pages and refer to 9 of the 12 annexures. Paragraph 9.3 of the particulars of claim reads as follows:

9.3 Since 2011, till the beginning of 2021, the Plaintiff continued to provide the First Defendant and the Trust with professional legal services in numerous further matters pertaining to-

9.3.1 The continuous Sharemax saga;

9.3.2 *The personal legal and/or litigation matters of the First Defendant and the Trust;*

9.3.3 *Spanish Ice Properties 58 (Pty) Ltd of which the First Defendant is/was a director; as well as*

9.3.4 *Further litigation and legal advice on behalf of the Trust.*

*A summarized list encompassing of more than four hundred of the matters on which the Plaintiff received instructions on behalf of the Trust and First Defendant, is attached as **Annexure “VZ1”***

[8] The plaintiff then alleges that the first defendant, then acting in his personal capacity, approached the plaintiff “for purposes of rendering professional legal services”. No contract of mandate is alleged. No term relevant to remuneration for legal services is alleged. The particulars of claim, therefore, falls foul of the essential averments required for the formulation of a claim of an attorney who executed his or her mandate.⁷ The particulars of claim then continues to refer to annexure “VZ2” which is not unlike a deed of suretyship and an acknowledgment of debt concluded between the first defendant in his personal capacity, the trust of which the defendants are trustees and the company Spanish Ice Properties 58 (Pty) Ltd which is not a party to the litigation. The pleading then continues about sale of shares and the like agreements which may prove to be relevant and form part of the *facta probantia* but do not on their own constitute contracts that

⁷ See *Kruger v Resnick* 1955 (3) SA 378 (A); *Mnweba v Maharaj* [2001] 1 All SA 265 (C); (*Goosen v Van Zyl* 1980 (1) SA 706 (O); *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A); *Hlobo v Multi Lateral Motor Vehicle Accident Fund* 2001 (2) SA 59 (SCA); *Ivorl Properties (Pty) Ltd v Sheriff of Cape Town* 2005 (6) SA 96 (C))

would entitle a firm of attorneys to payment of professional fees for services rendered by it to the defendants.

[9] In paragraph 12 of the particulars of claim the plaintiff alleges the existence of a sectional covering mortgage bond over immovable property. The bond document is attached as annexure "VZ7". Paragraph 12 is followed by allegations in support of a finding that Rule 46A does not apply to the relief sought and in paragraph 14 section 26 of the Constitution of 1996 is mentioned and the defendants are alerted to its import and invited to "*place relevant information before the Court as to why the Court should not order the execution of the property.*" The particulars of claim ends with two further rubrics, namely "ADDITIONAL FACTORS TO BE CONSIDERED" and "CONCLUSION".

[10] I am of the view that some of the allegations contained in the plaintiffs of particulars of claim, when and if arranged in a proper order, would constitute a pleading containing allegations in support of all or some of the relief sought by the plaintiff against the defendants, but not in the form the cause of action is pleaded, stated differently and applying the "charitable test" and "benevolent interpretation" stated in Nel (supra)⁸ I am of the view that the allegations necessary to found a cause of action are contained in the particulars of claim.

⁸ At 149F

[11] However, sub-rules 18(4) and (5) provide as follows:

“18(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance.”

[12] The degree of precision with which a pleading must be formulated depends on the circumstances of each case.⁹ A plaintiff acts in breach of the abovementioned requirements if its particulars of claim include extensive extracts from and references to other documents and sources or if those statements made in the pleading are not material to any clearly disclosed cause of action.¹⁰

[13] A paragraph for paragraph analysis of the plaintiffs' particulars of claim would take up many pages and I do not intend burdening these papers with such an analysis.

[14] The plaintiffs' particulars of claim does not allow a court of law to distil the dispute from the particulars of claim and it does not enable the

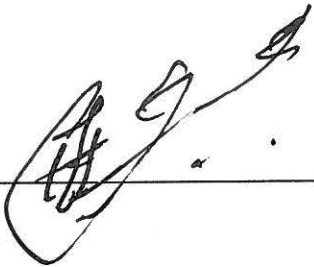
⁹ See *Inprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107

¹⁰ See *Heugh v Gubb* 1980 (1) SA 699 (C) at 702

defendants to plead thereto. In my view the plaintiffs' particulars of claim is vague and embarrassing to the extent that it does not serve and cannot serve as a pleading at all. Under the circumstances the plaintiffs' particulars of claim must be struck out.

I make the following order:

- (1) The exception is upheld with costs.
- (2) The plaintiff's particulars of claim is struck out.
- (3) The plaintiff is afforded twenty (20) days, if so advised, to deliver an amended particulars of claim.

A handwritten signature in black ink, appearing to be 'H F Jacobs', is written over a horizontal line.

**H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 30 November 2022.

APPERANCES

Excipient's counsel: Adv Z Schoeman

Excipient's attorneys: Tintingers Incorporated

Respondent's counsel: Adv HA van Wyk

Respondent's attorneys: Van Zyl's Incorporated